

BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI**MISSISSIPPI COMMISSION ON
JUDICIAL PERFORMANCE****PETITIONER/
APPELLANT****VS.****NO. 2015-JP-00996-SCT****DAVID SHOEMAKE
CHANCERY COURT JUDGE****RESPONDENT/
APPELLEE****MEMORANDUM BRIEF AND REPLY OF RESPONDENT/APPELLEE TO THE
MOTION TO STRIKE PORTIONS OF THE RESPONDENT'S BRIEF**

COMES NOW, Chancery Court Judge David Shoemake, Respondent/Appellee, ("Shoemake") by and through his attorneys, and in response to the Motion to Strike Portions of Respondent's Brief filed on behalf of the Mississippi Commission on Judicial Performance ("Commission") pursuant to the provisions of M.R.A.P. Rule 28(*l*) would show as follows:

I.

Acting indignant that Shoemake would defend himself, the Commission has filed a motion to strike portions of Shoemake's Brief. Shoemake would show that not only is his Brief fair comment but factually accurate and demonstrates the painful truth with regard to the handling of this matter against him. Without referring to the facts, or the undisputed and unchallenged testimony of Shoemake, the Commission claims he has made multiple untruthful statements, and that there is no shred of evidence that he was lied to by the Commission or that the Commission breached confidentiality.

II.

It is submitted that no disrespect can emanate from the truth. A simple review of Shoemake's **uncontradicted and uncontested (unchallenged)** testimony with reference to relevant facts and exhibits in opposition to the Commission's Motion is as follows:

At page 86 of the Show Cause Hearing Transcript (Ex. "4") Shoemake testified as follows:

6 **JUDGE MIDCALF:** When you left the
7 Commission that day, what thoughts were you
8 having?
9 **A.** I wish you hadn't of raised that. But I
10 - - I was called **to come up here by the investigator on**
11 **another matter.** And he said that it would help him
12 out greatly if I would come up here instead of him
13 coming to me or coming to the clerk's office.
14 And I came up - - I went and copied the
15 court file on that other matter and brought it up
16 here. And I walked in here, and two FBI agents came
17 in here and flashed badges at me.
18 Have you ever had it when - - that is a
19 terrifying experience. And when I left there, I was
20 sick.
21 **JUDGE MIDCALF:** And did you go back to
22 your office or to the courthouse or to - - did
23 you go and look at anything that day, any
24 records trying to piece - -
25 **A.** While I was sitting here with the

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1 agents, I called my administrator and asked her to go
2 see. Donna, can you find anything in the file drawers
3 concerning this? And she did. And she didn't find
4 anything.
5 **JUDGE MIDCALF:** That's all I have.
6 **A.** And when I got back - - not that day. I
7 couldn't do anything that day. But the next day I
8 started going and looking. I didn't call Joe Dale
9 Walker, because the agent said don't call.
10 I didn't call anybody. I told my
11 administrator. I said, "Listen. We have got to find

12 out what has happened in this file.”

The hearing at T.240, Shoemake testified as follows:

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13 Q. And did you ask at that time whether
14 or not there had been a petition filed against
15 you or was there a petition or complaint filed
16 against you?

17 A. Judge Toney said there was not a
18 complaint filed against me on - - on the Newsome
19 matter and I had been called up here on the
20 *Clements Estate*. And he said that the *Clements*
21 *Estate* was a civil matter and it had no business
22 in judicial performance.

23 Q. Who called you up here on the
24 Clements matter?

25 A. Mr. Ralph Holiman.

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1 Q. And what did he say to you?

2 A. He said, “**There’s a complaint in the**
3 ***Clements Estate***. Would you do me a favor? Our
4 budget is short. To save expenses would you
5 come to Jackson and bring a copy of the court
6 file?”

7 And we made an appointment for 10:00
8 on Friday morning for me to come with the
9 Clements Estate file. **I brought it up here and**
10 **brought it into this room right here. And was**
11 **two FBI agents came in and started asking me**
12 **questions about the *Newsome* orders.**

13 Q. Have you ever been interviewed by FBI
14 agents before?

15 A. No, sir.

16 Q. Did you have any independent
17 recollection on that day - - well, let me back up
18 just a little bit, Judge. How many orders might
19 you sign in any given day or in a week period?

20 A. I don’t have - - I don’t know. I
21 just sign a large number of orders. Any
22 chancery judge signs a large number of orders.

23 Q. When the FBI agents showed you the

24 orders on that date they met you, **did you**
25 **have any independent recollection of having**

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1 **signed or being involved with those orders?**

2 **A. No, sir, I did not.**

At page 41 of the Show Cause Hearing, (Ex. "4") Shoemake testified as follows:

6 **Q.** Have you questioned him [JDW] at all about how
7 your signature got on that order?

8 **A.** No, ma'am, I have not. And why I didn't
9 question him is the FBI agents told me not to. They
10 interviewed me in your office here in August. And
11 they told me not to talk to Judge Walker. And I have
12 not talked to Judge Walker.

13 **Q.** Okay.

14 **A.** And I didn't know about it until then,
15 until they interviewed me here at this table. (Emphasis added).

At the hearing held in this matter on March 16, 2015, beginning at page 210, Shoemake
further testified as follows:

1 **MS. MENAPACE:** The November the 1st
2 hearing was to have him suspended, not
3 removed.

4 **MR. CAMPBELL:** Okay.

5 **MS. MENAPACE:** Suspended with pay,
6 not removed.

7 **MR. CAMPBELL:** Okay. All right. Go
8 head.

9 **A.** I'm sitting here on November 1st.
10 I've just been told that the lawyer involved in
11 this was taking the Fifth Amendment. **I had been**
12 **told by the FBI in August that I had done**
13 **nothing wrong**, that I was - - my involvement in
14 this was unwittingly, that they were - - I was
15 not a target, that there were no charges against
16 me. But **they telling me that there were no**
17 **petitions.**

18 **And I told them those do look like**
19 **my signatures. But I just don't sign orders**

20 **without petitions, without a basis.**
21 And they got through with me. And
22 they told me, said, "Judge Shoemaker, do not talk
23 with Keely McNulty. Do not talk with Joe Dale
24 Walker. And, if they call you, here is our
25 card. You call us and let us know."

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1 So I - - and then, when they left,
2 Ms. Ballard came in and Mr. Toney came in. And
3 they said basically the same thing.
4 **Mr. Toney said, "There's not a**
5 **complaint filed against you.** You've been
6 unwitting" - -
7 Ma'am? What?
8 **MR. CAMPBELL:** Just - - you go ahead
9 and continue.
10 **A.** That my involvement was accidental
11 or unwitting. **Just like the FBI agent said,**
12 **that there was no complaint filed against me,**
13 **that the *Clements* matter that I was called up**
14 **there on under false pretenses by the**
15 **investigator - -**

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22 **A.** Well, if I could continue with my
23 context.
24 I was being told that Judge Walker
25 and Keely McNulty had done something wrong. And

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1 I was being - - had been told that I had done
2 nothing wrong, that I was unwittingly.
3 And when Ms. Ballard and
4 Mr. Holiman came to my office on October
5 the 17th to deliver the complaint, they said I
6 was a patsy.
7 **but I didn't have any documents to**
8 **go back and look at. No documents were given to**
9 **me by Ms. Ballard before November the 1st except**
10 **the August the 1st Email from Keely McNulty.**
11 **I had nothing to look at.**

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9 Q. When you met here with Judge Toney
10 and Darlene Ballard, what day was that on?

11 A. I think that was August the 23rd of
12 2013.

13 Q. And did you ask at that time whether
14 or not there had been a petition filed against
15 you or was there a petition or complaint filed
16 against you?

17 A. **Judge Toney said there was not a**
18 **complaint filed against me on - - on the Newsome**
19 **matter and I had been called up here on the**
20 ***Clements Estate*.** And he said that the *Clements*
21 *Estate* was a civil matter and it had no business
22 in judicial performance.

23 Q. Who called you up here on the
24 Clements matter?

25 A. Mr. Ralph Holiman.

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1 Q. And what did he say to you?

2 A. **He said, "There's a complaint in the**
3 ***Clements Estate*.** Would you do me a favor? Our
4 budget is short. To save expenses, would you
5 come to Jackson and bring a copy of the court
6 file?"

7 And we made an appointment for 10:00
8 on Friday morning for me to come with the
9 Clements Estate file. I brought it up here and
10 brought it into this room right here. And was
11 two FBI agents came in and started asking me
12 questions about the *Newsome* orders.

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24 Q. All right. And later you did get
25 served with a show cause order. Correct?

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1 A. On October the 17th or 18th of 2013.

2 Q. And did you later find that there
3 was a petition or complaint that was indeed
4 filed against you earlier?

5 A. Well, there was a complaint in the

6 package that Ms. Ballard and Mr. Holiman
7 delivered the Marilyn - - **the complaint that was**
8 **signed by Ms. Newsome and prepared by Terrell**
9 **Stubbs that was dated May the 2nd of 2013.**

10 **Q. Now, you had not known about that**
11 **since May of 2013, had you?**

12 **A. No, sir.**

13 **Q. And you didn't know about it when**
14 **you came to talk to Judge Toney and Ms. Ballard**
15 **and the FBI agents either, did you?**

16 **A. No, sir.**

17 **Q. And was it delivered to you, or were**
18 **you made aware of that complaint within 90 days?**

19 **A. No, sir. Not within 90 days of**
20 **May the 2nd of 2013.**

21 **Q. Now, after you got served with the**
22 **complaint by Ms. Ballard and Mr. Holiman, I**
23 **think you said it was on the 17th. Is that**
24 **correct?**

25 **A. Yes, sir.**

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1 **Q. Did we, on your behalf, attempt to**
2 **find out what investigatory materials that**
3 **Ms. Ballard might have had that would have**
4 **helped you understand what was afoot?**

5 **A. You copied me with two letters that**
6 **you wrote to ms. Ballard requesting those**
7 **materials.**

8 **Q. Let me show you which is my**
9 **Exhibit No. 23. [Hearing Ex. "11", 10/21/2013 letter to Ballard] Is that our first request for**
10 **Ms. Ballard to produce to us any investigatory**
11 **materials that pertain to this matter?**

12 **A. Yes sir.**

13 **Q. Did she furnish any investigatory**
14 **materials to us?**

15 **A. Not that I am aware of.**

16 **Q. Let me show you my Exhibit No. 24 [Ex. "11", 4th pg - email from Ballard at**
17 **7:52 pm on 10/21/2013]**
18 **an E-mail back from Ms. Ballard. You see the**
19 **E-mail on the lower half of the page?**

20 **A. Yes, sir.**

21 **Q. Read what she said in that E-mail,**

21 if you don't mind.
22 A. Well, you want me to read the whole
23 thing?
24 Q. Just the first couple sentences, I
25 think.

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1 A. Mr. Jones, I am in receipt of and
2 thank you for your letter dated this date
3 noting your representation of Judge David
4 Shoemaker. We are at the moment relying
5 upon the court records as documentation.
6 Q. Now, did she - - look at - - read the
7 last sentence also, if you don't mind.
8 A. The case has been investigated by
9 our investigator, Ralph Holiman, although
10 I did sit in on some witness interviews.
11 Q. **Did she produce any additional**
12 **documents to us?**
13 A. **Not that I'm aware of.**
14 Q. Look at what's been marked as my
15 Exhibit 25 or - - Exhibit 25.[*Ex. "11", 10/22/13 Ltr to Ballard*] And was that
16 another request on your behalf to obtain any
17 investigation materials that might have been
18 developed?
19 A. Yes, sir.
20 Q. If you don't mind, read the last
21 sentence.
22 A. **Again, I need to know if you are**
23 **going to produce any of the requested**
24 **documents particularly any statements from**
25 **Mr. Teater, Ms. McNuty, Judge Joe Dale**

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1 **Walker, et cetera.**
2 Q. **Did we get any documents from**
3 **Ms. Ballard?**
4 A. **Not - - not at that time**
5 MS. MENAPACE: I object.
6 MR. CAMPBELL: What's the basis for
7 the objection?
8 MS. MENAPACE: It's not true. And
9 we can go back and hash all of this

10 discovery stuff again. But I can show all
11 the different things that were produced
12 starting October the 17th of 2013 through
13 today.
14 MR. CAMPBELL: Okay. Is this - -
15 does that include your statements on the
16 record earlier this morning?
17 MS. MENAPACE: Yes, sir.
18 MR. CAMPBELL: Yeah. Okay.
19 Noting that objection, you can
20 continue.
21 MR. JONES: **Mr. Campbell, my only**
22 **response would be if you provide documents**
23 **to people, you do it with a certificate of**
24 **service, a letter of transmittal. There**
25 **are none.**

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1 MS. MENAPACE: I disagree.
2 MR. CAMPBELL: Well, look. Wait
3 just a minute. I don't necessarily agree
4 with that statement. I don't know that it
5 matters.
6 But your position is noted. Let's
7 continue with the deposition on the two
8 issues we identified at the outset.
9 I'm sorry. Let's continue with
10 testimony relative to those issues.

11 MR. JONES:
12 **Q. Did we later, Judge Shoemaker, obtain**
13 **a copy of the investigative reports of Ralph**
14 **Holiman of July 30, 2013, and October 22, 2013?**
15 **A. It wasn't until the fall of '14 - -**
16 **2014 that we obtained it.**
17 **Q. Let me show you Exhibit 36; my 36.**
18 **Was that report prepared before my request for**
19 **documents from Ms. Ballard by my letters of . . .**
20 **A. Yes. The date of the report is**
21 **July 30, 2013.**
22 **Q. Was it provided to us before the**
23 **show cause hearing?**
24 **A. No, sir. (Emphasis added).**

With the exception of one email given to Shoemake in the hallway of the Commission's offices the day before his Show Cause Hearing, the Commission is challenged to show any proof whatsoever of delivery to Shoemake and his counsel of any documents prior to the August 29, 2014, production (*RE* "1"). Specifically, the Commission is challenged to show the date it produced to Shoemake the reports of July 30, 2013, or October 22, 2013, from the Commission's investigator, Ralph Holiman ("Holiman"), or any other document prior to the Show Cause Hearing. Further the Commission received at its offices on October 23, 2013, eight (8) days prior to his scheduled Show Cause Hearing, (*RE* "17") an email from the Court Administrator for then Chancellor Joe Dale Walker ("Walker") to Keely McNulty ("McNulty") dated January 5, 2012, (10 pgs.) that plainly demonstrated the need for, and the specific reasons for, correcting the bid that would have been enormously beneficial to Shoemake in refreshing his memory of the events from two years before. Commission counsel knew Shoemake had no independent memory of signing the orders but yet these documents (*RE* "17") were also withheld from Shoemake.

Against this backdrop, the Commission argues that Shoemake's Brief is disrespectful or contemptuous toward the *Trial Court*.¹

The Commission complains as follows:

a) Page 11, Footnote 11 alleges that the Commission misled and trapped Respondent leaving him with no way to defend himself.

Response: The evidence is undisputed that Shoemake was told there was no complaint

¹Interestingly, the *Trial Court* referred to is the Mississippi Commission on Judicial Performance. The other party is also, the Mississippi Commission on Judicial Performance. There is simply no distinction or separation between the two and the Commission shows no compunction whatsoever to enforce its own rules or regulations, and sees no unfairness whatsoever to what occurred to Shoemake in the way this matter was handled.

filed against him. His testimony regarding this fact is not disputed nor challenged anywhere in the record by counsel for the Commission. In fact, not one single time did counsel argue against Shoemake's testimony or attempt to impeach Shoemake's testimony as to what he was told to entice him to come to the Commission's offices or what he was told when he arrived at the Commission's offices. There was no attempt to have Holliman impeach Shoemake's testimony nor was Toney called to impeach Shoemake's testimony because what Shoemake testified to is the TRUTH. To NOW suggest Shoemake's testimony is inaccurate without any supporting evidence is incredulous.

Commission Rule 5C. requires that Judges be notified within ninety (90) days of the complaint being filed against him. *See also: Policies and Procedures Manual of the Mississippi Commission on Judicial Performance, Section 1.4, pages 1 through 3.*² It is undisputed this did not occur. The fact Shoemake would not be entitled to dismissal for the Commission's violation of its rules is quite different from deliberately telling Shoemake, at the time of Shoemake's interview by the Commission's Executive Director, its counsel and the FBI on **August 23, 2013**, that no complaint had been filed against him when there plainly was one existing since **May 3, 2013**. (RE 25). Shoemake's claim that he was misled, trapped and left with no way to defend himself at the Show Cause Hearing is legitimate and entirely accurate description of the handling of this matter by the Commission.

The Commission further alleges:

b) Page 11, Footnote 12 alleges that the Commission somehow ambushed Respondent and deprived him of his right to counsel.

² In the policies and procedures manual, the Commission adopted internal procedures that conform to the requirements of Rule 5 to assure adherence to the ninety (90) day requirement for notification of judges but did not follow their own procedures.

Response: The evidence is abundantly clear that the Commission lured Shoemake, at his expense, to Jackson, Mississippi, to discuss the *Clements* matter. He was not notified ahead of time that he would be interviewed by law enforcement officers of the United States Government (FBI) nor queried by the Commission's Director and counsel regarding the *Newsome* matter. It is submitted that even a judge is entitled to assistance of counsel and that it is highly improper and disrespectful to use a pretext to lure a duly elected judge to Jackson, Mississippi, for such interviews.

A review of the transcript of the July 11, 2014, hearing on Shoemake's motion to dismiss reveals Commission counsel was well aware Shoemake did not know he was going to be interrogated by the FBI, or Commission counsel for that matter, on the Newsome estate. Counsel admits Shoemake was called to the Commission on an unrelated matter and even goes so far as to admit she "might've done it differently". See: *Excerpts from Hearing on Motions, July 11, 2014, attached to this memorandum brief as Exhibit "A"*. It does not matter counsel was not the Executive Director; she stood by and allowed it to happen with absolutely no evidence in the record she ever objected or took it upon herself to correct the misrepresentation. The undisputed fact is she knew a complaint was filed against Shoemake and allowed him to leave the Commission's offices believing otherwise; period, end of statement.

Mississippi Rules of Professional Conduct ("M.R.P.C.") 3.8 addresses special duties required of prosecutors and states in applicable part as follows:

The prosecutor in a criminal³ case shall:

. . . .

³ It is admitted this is not a "criminal" case in the truest sense of the word but, like disciplinary proceedings before The Mississippi Bar, it is certainly *quasi-criminal* in nature. See: *The Mississippi Bar v. Coleman*, 849 So. 2d 867 (Miss. 2004); *Levi v. Mississippi Bar*, 426 So. 2d 781 (Miss. 1983).

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
....

As a *quasi-criminal* case, a judge, as an attorney in a disciplinary matter before The Mississippi Bar, is entitled to “fundamental due process protections throughout the course of the proceedings”. *U.S.C.A. Const. Amend. 14; The Mississippi Bar v. Drungole*, 913 So.2d 963 (Miss. 2005). In this instance, Shoemake was clearly ambushed with the cooperation and complicity of Commission staff and counsel as well as the FBI and deprived fundamental due process. This was a tactic beneath the dignity of the Commission and is properly described as an ambush. Again, Shoemake’s testimony about this course of events is uncontradicted.

The Commission complains,

c) Page 21, Paragraph 2 and Footnote 26 alleges that the presiding member of the panel became a prosecutor during the hearing and had already determined the outcome before the hearing;

d) Page 22, Paragraph 4 alleges again that the presiding member of the panel acted as a prosecutor.

Response: Shoemake submits that describing the actions of alternate Commission member Roy Campbell (“Campbell”) as having become a prosecutor during hearing is in no way disrespectful nor improper. It is important to remember that after announcing there would be no need for opening

statements, it was Campbell who set the issues for consideration at the hearing:

- (i) Did Appellee sign the orders identified in Count 1 of the second amended formal complaint under the circumstances that are alleged in that amended complaint; and
- (ii) At the time of the Appellee's testimony on November 1, 2013, at the show cause hearing concerning his signatures on those orders, did he know or should he have known that his testimony was deceptive and misleading. *See: Hearing Transcript at page 32, lines 4 -14; and page 251, lines 23-25.*

Remember also, Campbell was one of the three members of the panel that heard the original testimony which was now in question and voted, apparently, not to recommend removal from office pending a final hearing.

The objectivity of Campbell was then and is now challenged. His questioning began at page 315 of the transcript and covered subject matter and issues not considered by Commission attorneys to be a part of their case. Due process requires that a judge who is otherwise qualified to preside at a trial or other proceedings must be sufficiently neutral and free of disposition to be able to render a fair decision. *Collins v. Dixie Transport Inc.*, 543 S. 2d, 160. Although limited to the facts of that opinion, this court has plainly stated that it is reversible error for the same person to act as a trial judge and witness under the circumstances here shown. Campbell was a witness to Shoemake's alleged misrepresentations which are vehemently denied. He plainly and unequivocally did pursue his own line of questioning of Shoemake beginning at page 315 of the transcript. Shoemake's complaint that Campbell became a prosecutor and had already determined the outcome of the hearing is factual. These complaints of Shoemake are not made up and cannot otherwise be considered disrespectful.

III.

The Commission also complains,

e) Page 24, Appellee's Point 6 (iii) alleges that the Commission erred by "engaging in conduct that intentionally misrepresented certain matters to Appellee with the intent to deceive Appellee as to counsel's intention with respect to the complaint filed by Newsome and the extent of counsel's investigation thereof".

Response: If Commission counsel had intended to notify Shoemake within the time frame required by Commission Rule 5C., it should have done so before the ninety-first (91st) day. It is plainly obvious the Commission did not intend to do so, withheld disclosure to Shoemake of the filing of the Newsome complaint after the expiration of ninety (90) days, then interviewed Shoemake in Jackson, Mississippi, without disclosing the existence of that complaint and purposely told him that no complaint was filed against him when there was a complaint on file.

This is indeed conduct intentionally misrepresenting certain matters to Shoemake with no other logical conclusions. The Commission certainly did not intend to disclose to Shoemake the existence of the complaint filed against him. It is with feigned indignation the Commission complains that Shoemake's claim that he was deceived is an improper allegation. The Commission plainly scheduled the interview with agents of the FBI. The Commission's attorney clearly understood Shoemake had been told to come to Jackson for a different reason, and at some point Commission staff and directors agreed to make the offices of the Commission available to the FBI. Shoemake submits that the Commission indeed engaged in conduct that intentionally misrepresented matters to him with the intent to deceive him to come to Jackson, without counsel, and the entire matter was coordinated by the Commission. Again, the testimony of Shoemake is uncontradicted,

and was not challenged at the hearing.

The Commission further complains as follows:

f) Page 26, 3rd full paragraph, alleges that the Commission mis-characterized facts developed at the hearing and did not pay attention to the incorrect findings of the Committee but rather “rubber stamped” the Committee Findings.

Response: The digital heritage of the findings of the Committee can be directly traced to Commission Counsel’s Proposed Findings Of Fact, Conclusions of Law and Recommendations beginning at Clerk’s Papers 717. For example, lifted from paragraph 37 of that document (*CP 735*) Commission attorneys argued that Shoemake did not answer during examination with responses such as “I do not know”, or “I am not sure”. Although Shoemake did initially deny he had signed the order with just his signature at the top of a page, the Commission made no mention and in no way discussed the fact it was Shoemake that brought this order to their attention. Importantly however, this assertion found in paragraph 37 that Shoemake did not answer during his examination “with such responses such as I do not know or I am not sure” is an absolutely incorrect finding of the Committee. We will review the record again:

“I can’t remember that detail that far back . . . I can’t say for certainty that on the date I signed that order I knew that.” (*RE “4”, p. 14*);

“But for me to tell you the - - some two-plus years after the exact signing, I can’t tell you everything that transpired.” (*RE “4”, p. 11*);

“I don’t recall from back then.” (*RE “4”, p. 28*);

“I don’t have a handwriting expert . . .” (*RE “4”, p.76*).

In response to the questions about how his signature may have been obtained upon an order

that was filed without a petition, Shoemake plainly stated “No ma’am I don’t have a satisfactory explanation. I can’t - I can’t figure it out and I can’t name names or point fingers. But somehow or another somebody put my signature on an order without presenting that order to me.” “I don’t do business that way. I just do not do business that way as a judge.” (*RE “4”, p. 45, see also p. 50*).

“But the other orders do have a resemblance to my signature.” (*RE “4”, p. 51*)

“I’ll say no, it’s not my signature. It looks like my signature. But I don’t think it is my signature. I think it’s been transposed or cut and pasted or something.” (*RE “4”, p. 30 referring to RE 5, brought to the hearing by Shoemake himself*).

“With what I know now (with two weeks to prepare for the Show Cause Hearing), I’ve got to say those aren’t my signatures”(*RE “4” p. 52*). (Emphasis added).

Claiming Shoemake did not answer with responses such as “I do not know” or “I am not sure” is indeed a mis-characterization of the testimony of Shoemake. It is submitted that Shoemake, although he did not use the exact words as “I do not know” or “I am not sure” said much more in his testimony. His claim that the Commission mis-characterized the facts developed in his testimony at the hearing, or they did not pay attention to the incorrect findings of the Committee, as clearly pointed out in Shoemake’s response to the Committee’s findings, and “rubber stamped” them, is indeed an accurate statement.

The suggested language would have, according to the author of that language, exonerated Shoemake. The digital heritage of that language can be found also at Clerk’s Papers 780, Findings and Recommendations of Committee “Respondent did not answer during his examination with responses such as “I do not know” or “I am not sure”. Clerk’s Papers 808, pg. 29 of Findings. The panel plainly adopted almost entirely the proposed findings of Commission’s attorneys that appears

at Clerks Papers 717. These claims that Shoemake did not answer in a fashion that would have been acceptable to the Commission, simply ignores Shoemake's testimony. *See: Full Commission Findings of Facts and Recommendations (CP 927, p. 31)*. "Respondent did not answer during his examination with responses such as 'I do not know' or 'I don't remember'." This is essentially the same cut and pasted document prepared from the proposed Findings of Fact of the Commission's attorneys.

Shoemake's testimony is central to whether or not he intended to mislead or deceive and it is submitted the Commission has mis-characterized what Shoemake said, did not pay attention to the proposed findings of fact submitted by Shoemake to the Committee or Shoemake's objections to the Committee's findings and simply did not consider one single thing Shoemake actually said. The Commission indeed mis-characterized the facts developed at the hearing and did not pay attention to the incorrect findings of the Committee. The Commission did "rubber stamp" or digitally cut and paste most of the Committee's Findings that were digitally cut and pasted from the proposed Findings of Facts submitted by Commission attorneys.

The Commission also complains the following:

g) Page 28, Footnote 30, alleges again that the Commission withheld documents from Respondent that would have somehow changed his testimony at the show cause hearing.

Response: It is impossible to conceive how in Shoemake's brief the Commission withheld documents which is clearly established by Shoemake's counsel's e-mails and the response to those e-mails from Commission counsel and that such would have changed his testimony is disrespectful.⁴

⁴Commission attorneys are challenged to demonstrate just how and what documents were produced to Shoemake, after his repeated requests before the hearing in this matter on November 1, 2013. It is submitted they cannot. There exists no letter of transmittal, nor any certificate of service of

The Commission further complains:

h) Page 33, Paragraph 3 and 4, allege the Commission staff engaged in a conspiracy with the FBI to deprive him of his right to counsel and misled him into thinking there was no complaint pending against him regarding the Newsome matter. This is simply untrue.

Response: Shoemake submits there is no evidence to the contrary. The wealth of undisputed facts and testimony show Shoemake indeed was led to Jackson on a pretext so he could be interviewed by FBI agents and Commission directors on another matter. Worse than not disclosing a complaint on file against Shoemake, was the fact he was told there was **not** a complaint filed against him. Shoemake's claims are consistent with him defending himself. There is no disrespect but a simple recitation of the painful facts as to how Shoemake was treated and how this matter was handled against him. The FBI was granted the *good offices* of the Commission to hold their interview. It was arranged ahead of time and it was done with the cooperation and complicity of the Commission's Executive Director, investigator and counsel; this is nothing short of a conspiracy.

The Commission further complains:

I sic) Page 37, incomplete paragraph at top of the page, refers to the indictments of Walker and Teater that are not in evidence in this proceeding.

Response: Throughout the course of these proceedings, Commission counsel has referred to "bid rigging". **Again**, there is no such thing as bid rigging on private projects. This was submitted only to clarify that Walker and Teater did not plead guilty to "bid rigging". The Court can take judicial notice of the pleas entered in the United States District Court for the Southern District of Mississippi. *See: Chad Teater Plea to Obstruction of Justice, U.S.D.C. for the Southern District of*

any such documents.

Mississippi, Northern Division, Criminal NO. 3:14cr108 DCB-FKB, and Joe Dale Walker Plea to Obstruction of Justice, Criminal Cause No. 3:14cr93 DFJ-FKB.

j) Page 44, last paragraph, alleges that Commission counsel engaged in a “course of deceit and misrepresentation deliberately designed” to mislead Respondent;

Response: This issue is fully addressed elsewhere in this memorandum brief and Shoemake stands by the previous argument.

k) Page 46, 1st paragraph of the Conclusion, accuses Commission staff of suborning perjury;

Response: What Shoemake’s brief states is “[u]nfortunately, Commission attorneys either did not know or let this witness perjure herself anyway”. There can be no *subornation* of perjury without direct knowledge and an actual attempt on the part of one party to compel the witness to testify falsely. Shoemake can make no statement as to what Commission counsel knew or did not know and has no knowledge that Commission counsel coached the witness to testify falsely. One thing is known: she did testify falsely and even a casual review of the documents in the conservatorship file and those provided by McNulty would have revealed the falsity of her testimony. Notwithstanding, the “Commission” still found her testimony to be sincere and credible although the “Commission” did not hear one word of her testimony.

l) Page 47, 1st paragraph, accuses the Commission of misleading and deceiving elected judges, of withholding information from them, violating the rules of the Commission and lying in wait for a judge to make a misstep; and

Response: This issue is fully addressed elsewhere in this memorandum brief and Shoemake stands by the previous argument. But to further the point of the violation of rules, the Court should

not forget the release of confidential information to the *The Magee Courier/Simpson County News*. The Commission has complained there is not a shred of evidence the Commission breached its own confidentiality rules and prohibitions. In stark contrast to this statement, Shoemake refers to his Amended Second Motion to Dismiss (CP 67) and the admitted statements of the Commission's Executive Director that "[h]owever, in an effort to answer [the Motion to Dismiss] there may have been some telephone calls between the commission and Stubbs regarding the need for his client, Ms. Newsome, to come testify or regarding the status of the pending case." (See: *Clerk's Papers* 224).

On August 29, 2014, (incorrectly referred to as April 29, 2014 on Page 45 of Shoemake's Brief) the Commission produced Ex. "1" and within those documents was Shoemake's RE 30. *Using Adobe it is page 397*. This document is dated November 13, 2013, from the Law Office of Terrell Stubbs furnishing the samples of Shoemake's signatures to the Commission's Executive Director days before the full Commission's findings from the Show Cause Hearing were filed on November 19, 2013. (CP 49). The Editorial in *The Magee Courier/Simpson County News* appeared at a time when Shoemake was seeking re-election. There was more than a "shred" of evidence that breaches of confidentiality emanated from within the Commission and arguably at the most inappropriate time for Shoemake. This facsimile from Stubbs' office to the Commission (RE 30), was not produced to counsel for Shoemake until August 29, 2014, and hidden within 1377 pages of documents.

What is important to note from the article is the reference to the Commission's employment of a handwriting expert. At the hearing on Shoemake's motion to dismiss, counsel attempts to deflect blame for the leak on the number of attorneys present at the hearing of Walker. However, counsel forgets the decision to hire a handwriting expert would not have been made until **AFTER** Shoemake's hearing because she would have had no reason to request one until Shoemake testified.

Remember too, it was Stubbs' office that supplied the documents to be used for the handwriting analysis on November 13, 2014; twelve (12) days after Shoemake's hearing. **How would anyone outside of the Commission's offices know that a handwriting expert was being employed if it was not leaked by the Commission?????**

Further, while the Commission may engage in questioning witnesses or potential witnesses in obtaining information, the release of this type of sensitive information in the middle of an election to individuals, Stubbs, with an agenda against Shoemake due to Shoemake's repeated sanctioning of the individual, is inconceivable. To Shoemake's benefit the electorate disregarded the sensationalistic journalism and re-elected him despite the release.

m) Page 48, last paragraph, accuses the Commission of acting as a "mini-FBI agency, abandoning its own purpose and being unable to prove any misconduct, simply playing "gotcha" with Shoemake, trying to exploit his testimony by claims that he attempted to mislead or that he was deceptive."

Response: This issue is fully addressed elsewhere in this memorandum brief and Shoemake stands by the previous argument. But to further the point, the evidence is clear Commission counsel was in lock step with the FBI.

CONCLUSION

Reiterating from earlier in the brief, **no disrespect can emanate from the truth.** The fact Commission counsel does not like the evidence and cannot provide documentary or testimonial evidence to rebut the truth is not cause for claiming Shoemake is being disrespectful to the Commission. Perhaps counsel believes the Commission should be cloaked with absolute power to do whatever it likes in its investigations and trials to the exclusion of fundamental due process

without being challenged. If so, that is a dangerous road for this Court to allow the Commission to travel.

Simply put, every one of the arguments put forth by the Commission is refuted by uncontradicted, unrebutted, documentary or testimonial evidence and no portion of Shoemake's brief should be struck.

Respectfully submitted:
David Shoemake

August 14, 2015

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CERTIFICATE OF SERVICE

I, Andrew J. Kilpatrick, Jr., do hereby certify that I have this day electronically filed a true and correct copy of the foregoing Memorandum Brief and Reply of Appellee/Respondent to the Motion to Strike Portions of Respondent's Brief with the Clerk of the Mississippi Supreme Court of Appeals using the MEC system which sent notification unto the following:

Darlene Ballard, Esq.
Bonnie Menapace, Esq.
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Further, I hereby certify that I have mailed by United States Mail, postage fully prepaid, the document to the following non-MEC Participants:

Judge Lee J. Howard
Commission Chairman
P.O. Box 1679
Starkville, Mississippi 39759

This the 14th day of August, 2015.

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BEFORE THE MISSISSIPPI COMMISSION
ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING A JUDGE
NO. 2013-083

HEARING ON MOTIONS

JULY 11, 2014

TRIBUNAL

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1 objection.

2 You may proceed.

3 MS. BALLARD: Our current -- our
4 investigator at the time, Ralph Holiman,
5 was a retired DEA agent. So he had some
6 familiarity with some of the FBI agents
7 that were involved in the case.

8 I think they had an ongoing dialogue
9 about any progressions that were -- you
10 know, any -- any new matters that were
11 coming up regarding the Newsome
12 conservatorship.

13 Ralph had sent the letter that's
14 been talked about here asking Judge
15 Shoemake to come talk to us about another
16 matter, 2013-087. That was common. We
17 have lots of judges we ask to come see us
18 and talk to us about certain complaints.

19 When he got here -- the FBI became
20 aware that he was coming to our office to
21 discuss a matter. So they asked --

22 JUDGE MIDCALF: Let me make sure
23 that the record is clear, that the Panel
24 is clear. 087, did that matter involve
25 Judge Shoemake directly --

1 MS. BALLARD: Yes.

2 JUDGE MIDCALF: -- or was that about
3 another judge?

4 MS. BALLARD: No, it involved Judge
5 Shoemake.

6 JUDGE MIDCALF: Okay.

7 MS. BALLARD: So when he got here,
8 the FBI was here. They asked could they
9 come and -- when they found he was coming,
10 they asked could they come and talk to him
11 at the same time, because they didn't --
12 they really were hesitant to go to his
13 office, his home, his courtroom because he
14 was not a target of the investigation.

15 They didn't want to do anything that
16 would embarrass him in front of his
17 constituents, because he was not the
18 target of the investigation.

19 Now, I was not the director at the
20 time. Had I been the director, I might've
21 done it different. I don't know. But I
22 was not the director at the time.

23 I, you know, very well might have
24 told Judge Shoemake that he needed to come
25 and the FBI was gonna be here. I don't